90-403

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOSEPHINE A. ANDES,

Petitioner,

vs.

THEODORE R. KNOX,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1.

THE FOLLOWING DATES ARE UNDISPUTED IN THE RECORD:

12/7/84	PETITIONER DISCOVERS THE WIRE-TAP
1/19/87	EFFECTIVE DATE OF 18 U.S.C. 2520(e), WHICH ESTABLISHED A TWO-YEAR STATUTE OF LIMITATIONS IN WIRETAP CASES
11/22/88	PETITIONER FILES SUIT IN THE DISTRICT COURT

THE QUESTION IS WHETHER PETITIONER'S SUIT IS TIMELY, WHERE THE CLAIM ARGUABLY ACCRUED MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF 18 U.S.C. 2520(e), BUT THE SUIT WAS FILED LESS THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THE STATUTE.

DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME CIRCUIT COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

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PRIOR OPINIONS IN THIS CASE

The opinion of the United States District Court for the Western District of Missouri in this matter is unreported, but appears in full in the Appendix at page 6.

The opinion of the United States Court of Appeals for the Eighth Circuit in this matter is reported at 905 F.2d 188, and appears in full in the Appendix at page 1.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 31, 1990, affirming the judgment of the United States District Court for the Western District of Missouri, dated June 2, 1989. The Court of Appeals thereafter denied a timely petition for rehearing on July 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

18 U.S.C. Sec. 2520 Recovery of Civil Damages Authorized

(a) In general. Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate caes; and

(3) a reasonable attorney's fee and other litigation costs reasonably in-

curred.

(c) **Computation of Damages.**

(1) [Section on damages for satellite signal interception omitted as not relevant]

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.** A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law

enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

STATEMENT OF THE CASE

The facts which are relevant to this Petition for a Writ of Certiorari are best stated by a simple chronology of events:

1984 Petitioner Josephine A. Andes files an action in the Circuit Court of Jackson County, Missouri for dissolution of her marriage to her (now former) husband, John W. Frick. At a presently unknown time after the filing of the petition for dissolution of the marriage, Respondent Theodore R. Knox is hired by Mr. Frick, and in the course of that employment places, or causes to be placed, one or more electronic surveillance devices on Petitioner's telephone line at her home in Blue Springs,

Missouri.

12/7/84 Petitioner discovers the electronic surveillance device in her home.

6/20/85 John W. Frick, during a deposition in the dissolution proceeding, states under oath that Respondent Knox was hired only to follow Petitioner, and to take photographs of her. During the same deposition, when directly asked whether he had ordered or participated in the placing of the wiretap, Mr. Frick invoked his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. [Appendix at page 26]

9/24/85 The marriage of Petitioner and John W. Frick is dissolved.

10/23/86 Congress enacts the first

federal statute of limitations on actions for civil damages as a result of unlawful electronic surveillance, Public Law 99-508, Title I, Sec. 103, 100 Stat. 1854.

1/19/87 Public Law 99-508 becomes effective as 18 U.S.C. 2550(e).

12/26/87 Leslie Albin pleads guilty to criminal violations of 18 U.S.C. 2511 in the United States District Court for the Western District of Missouri and as a result implicates Respondent Knox and others with reference to the wiretapping of Petitioner's home.

11/22/88 Petitioner files this suit in the United States District Court for the Western District of Missouri, naming Leslie E. Albin and Theodore R. Knox as defendants. The court's

jurisdiction was invoked under 28 U.S.C. 1331. (Hereinafter, Andes I)

6/2/89 Honorable Howard F. Sachs grants summary judgment in favor of Defendants in Andes I, on the basis that Petitioner's claim is barred by 18 U.S.C. 2520(e).

6/23/89 A Notice of Appeal to the United States Court of Appeals for the Eighth Circuit is filed in Andes I.

11/30/89 Petitioner files suit in the United States District Court for the Western District of Missouri against her former husband, and several attorneys and law firms representing Mr. Frick in the dissolution proceedings, alleging that they participated in the wiretapping of her home. (Case No.

89-1119-CV-W-6) (Hereinafter, "Andes II")

3/28/90 Honorable Howard F. Sachs, grants summary judgment in favor of defendants in Andes II, on the ground that the suit is barred by 18 U.S.C. 2520(e).

4/25/90 A Notice of Appeal to the United States Court of Appeals for the Eighth Circuit is filed by Petitioner in Andes II. (Case No. 90-9017WM)

5/31/90 The United States Court of Appeals for the Eighth Circuit affirms the decision of the District Court in Andes I.

7/11/90 The Eighth Circuit denies Petitioner's Motion for Rehearing and Suggestions for Rehearing En Banc in Andes I.

REASONS FOR GRANTING WRIT

1. THE FOLLOWING DATES ARE UNDISPUTED IN THE RECORD:

12/7/84 PETITIONER DISCOVERS THE WIRETAP

1/19/87 EFFECTIVE DATE OF 18 U.S.C. 2520(e), WHICH ESTABLISHED A TWO-YEAR STATUTE OF LIMITATIONS IN WIRETAP CASES

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THE QUESTION IS WHETHER PETITIONER'S SUIT IS TIMELY, WHERE THE CLAIM ARGUABLY ACCRUED MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF 18 U.S.C. 2520(e), BUT THE SUIT WAS FILED LESS THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THE STATUTE.

Factual Background

Petitioner discovered the wiretap on December 7, 1984, at a time when there was no federal statute of limitations on

filing suits for civil damages under the wiretap statute. Two years and forty-three days later, on January 19, 1987, 18 U.S.C. 2520(e) became effective, creating a two-year statute of limitations for civil damage suits arising out of unlawful electronic surveillance. One year, ten months and twelve days after the effective date of 18 U.S.C. 2520(e), Petitioner filed her suit. Both the trial court and the Eighth Circuit held her suit was untimely.

Conflict with Prior Decisions of this Court

In Sohn v. Waterson, 84 U.S. (17 Wall.) 596 (1873), this Court analyzed three options for resolving the application of a new statute of limitations to claims that accrued prior to the effective date of the statute. The first option, which was rejected, was to make the statute applicable only to claims arising after the effective date, thus leaving

prior claims with no statute of limitations. The second option, also rejected, was to apply it to cases where the cause arose before the effective date, but there was still a reasonable amount of time left before expiration of the limitation period, with the courts determining what was reasonable.

The third option, adopted by this Court, was to hold that for purposes of calculating the running of a new statute of limitations, the cause of action accrued on the date the cause was first subjected to the statute. Id. at 600. See also, Lewis v. Lewis, 48 U.S. (7 How.) 776, 778-79 (1849).

As recently as 1988, the Eighth Circuit relied on both Sohn and Lewis to bar a seaman's suit when the critical dates were an injury in March of 1980, a new three-year statute of limitations in October of 1980, and a suit filed in February of 1987. This interpretation,

i.e., that the plaintiff had until October of 1983 to file his suit, was found appropriate as a means to prevent application of the statute to the claim from being both retroactive and unconstitutional. Reynolds v. Heartland Transportation, 849 F.2d 1074, 1075 (8th Cir. 1988).

Andes II is another case arising out of the same wiretap incident, but against different defendants, which was filed in the Western District of Missouri on November 29, 1989, and is presently on appeal to the Eighth Circuit. (Petitioner does not herein waive, and specifically reserves, all factual and legal arguments available to her in Andes II.) The same trial judge, less than 10 months after his decision in Andes I, granted summary judgment for the Andes II defendants, holding that under Reynolds, Petitioner's failure to file by January 19, 1989 (within two years of the effective date

of 18 U.S.C. 2520(e)) made the suit untimely. [Appendix at 17-18] Thus, at least in the Western District of Missouri, Petitioner's suit could only have been timely filed if it was filed by December 7, 1986--more than a month before the statute of limitations went into effect.

There being a clear and direct conflict between the still-vital holdings of Sohn and Lewis, supra, it is respectfully suggested that this Petition for a Writ of Certiorari to the Eighth Circuit should be granted.

Retroactive Application of the Statute

There are two bases for arguing that the issue of whether the statute of limitations was applied retroactively, is properly before this Court.

The first is that under Supreme Court Rule 14.1(a), each "question presented will be deemed to comprise every subsidiary question fairly included

therein." As stated by the Eighth Circuit in Reynolds, supra, the rationale of Sohn, supra, is used to avoid the simultaneous results of retroactivity and unconstitutionality. The issue is legitimately raised.

The second basis is the "plain error" doctrine, whether under Rule 51, Fed. R. Civ. P., or Supreme Court Rule 24.1(a). In Carlson v. Green, 446 U.S. 14, 15, 100 S. Ct. 1468, 1470 (note 2), 64 L. Ed.2d 15 (1980), this Court considered an issue not presented in either the District Court or the Court of Appeals because it was an important, recurring issue and was properly raised in another petition for certiorari. While Petitioner's case in Andes II has not yet been decided by the Eighth Circuit, if it is again adverse, another petition for certiorari will be filed, raising essentially the same issues, although in a somewhat different factual context. The

issue of when a cause of action accrues under the wiretap statutes, especially when considering the secrecy inherent in the activity, is certainly both important and recurring, and thus warrants a decision by this Court.

In City of Newport v. Fact Concerts, Inc., 453 U.S. 245, 255, 101 S. Ct. 2748, 2754, 69 L. Ed.2d 616 (1981), the Court commented that Rule 51 review is "suited to correcting obvious instances of injustice or misapplied law." Given the fact that Petitioner's suit was filed less than two years after the enactment of a new two-year statute of limitations, granting summary judgment on the basis that the suit was untimely, and thus preventing her from presenting her claims to a jury, is an obvious instance of both injustice and misapplied law.

In United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936), this Court held:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

When a Court of Appeals upholds a District Court decision that a new two-year statute of limitations terminated and barred a cause of action forty-three days before the statute became effective, it is suggested that the error is not only obvious, but one that affects both the fairness and integrity of judicial proceedings.

With regard to the retroactivity of statutes, this Court has held that even where retroactivity might be permissible, it is not a favored interpretation, "except upon the clearest mandate,"

Claridge Apartments Company v. Commissioner of Internal Revenue, 323 U.S. 141, 164, 65 S. Ct. 172, 185, 89 L. Ed. 139 (1944), and:

> ...the first rule of construction is that legislation must be considered as addressed to the future, not to the past * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." [Citations omitted]

Greene v. United States, 376 U.S. 149, 160, 84 S. Ct. 615, 621-22, 11 L. Ed.2d 576 (1964).

In the only other reported decision construing 18 U.S.C. 2520(e), Scutieri v. Estate of Revitz, 683 F. Supp. 795, 799 (S.D. Fla. 1988), the District Court held:

> ...not only does this act not purport to operate retrospectively, but, the act provides that "amendments by this act are effective 90 days after enactment." [Citation omitted] Without a clear statement indicating the legislature intended to apply the new two-year statute of limitations retrospectively, the court will not apply the 1986 amendment to 18 U.S.C. Sec. 2511 retrospectively...."

Applying these principles to Andes I, it is suggested that the District Court's decision that the statute barred Petitioner's cause of action, simply because the claim arguably accrued more than two years prior to the effective date of the statute, is an obvious retroactive application of the law, which is not supported by any indication from the Congress of that intent. Such a retroactive application is, on its face,

a denial of Petitioner's rights of due process under the Fifth Amendments, and particularly under the Taking Clause in the Fifth Amendment.

Question 1 Summary

The decisions in this case in the District Court and the Eighth Circuit directly conflict with this Court's decisions in Sohn, and Lewis, supra, and by foreclosing Petitioner's claim, thereby amount to a retroactive and thus unconstitutional application of 18 U.S.C. 2520(e) to Petitioner's cause of action. Reynolds, supra. For these reasons, the Writ of Certiorari should be granted.

2. DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

Background

During a substantial portion of 1984, Petitioner was involved in a bitter divorce in the Circuit Court of Jackson County, Missouri. On December 7, 1984, she discovered a wiretap in her home. Between then and the actual dissolution of her marriage in late 1985, she assumed that her then-husband, John W. Frick, was

responsible for the wiretap. [Legal File in the Eighth Circuit at 52: excerpt from Petitioner's deposition in the divorce proceedings on August 30, 1985] Mr. Frick's deposition was also taken on June 20, 1985 [Appendix at 23], during the course of which he perjured himself by claiming that Respondent had only been hired to follow Petitioner and take photographs, and then, when asked about his direct involvement with the wiretap, availed himself of his Fifth Amendment right against self-incrimination. [Appendix at 23-26]

On December 26, 1987, Leslie Albin pleaded guilty to various wiretap charges under 18 U.S.C. 2511, in United States v. Albin, No. 88-00283-01-CR-W-6. It was as a result of that guilty plea, Petitioner has alleged in her complaint, that she first became aware of the identities of at least some of the participants in the wiretap other than her assumption her

husband was involved. She filed suit within less than a year of acquiring this knowledge.

The District Court held that Petitioner's claim accrued in 1984 the day she found the wiretap, and inferentially found that she "knew" (her word was "assumed") in at least mid-1985 that her husband was responsible. The District Court then reasoned that she could have filed suit against Mr. Frick and used the discovery process to learn the identities of the other tortfeasors, thus preserving her claims against all of them.

Wiretap Accruals:

Conflicts and Confusion

Comparatively few cases have directly addressed the issue of when a cause of action accrues in a wiretap case. In Brown v. American Broadcasting Company, Inc., 704 F.2d 1296, 1304 (4th Cir. 1983), the Fourth Circuit applied the discovery rule, i.e., "when the plaintiff

discovers, or by the exercise of due diligence could have discovered, that his communications have been intercepted." Yet in the paragraph after the definition of that rule, id., the court implicitly acknowledged the importance of knowing the identity of the tortfeasor:

> Electronic surveillance is by its very nature a tort which is concealed from a potential plaintiff. Unless the defendant discloses his activity to the plaintiff, or uses the information he obtains in a way which should put the plaintiff on notice of his activity, the tort may be concealed.

Citing Brown, supra, the Tenth Circuit discussed but did not decide which of the two options to apply to the facts in Newcomb v. Ingle, 827 F.2d 675, 679 (10th Cir. 1987) since under either rule the suit was untimely.

The District of Columbia Circuit

adopted the discovery rule in Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979). However, under the facts of that case, the discovery of the existence of the wiretap and of the identity of the tortfeasor were simultaneous, as a result of a newspaper article some six years after the actual wiretapping. There was thus no issue relating to the identity of the tortfeasors.

Awbrey v. Great Atlantic & Pacific Tea Company, Inc., 505 F. Supp. 604, 609 (N.D. Ga. 1980), applied the "discovery of the wiretap" rule--but again in a factual context where the discovery of both the wiretap and the identity of the wiretapper were simultaneous. Cole v. Kelley, 438 F. Supp. 129, 138 (C.D. Cal. 1977), applied the discovery rule, but again wiretap/wiretapper discovery also occurred simultaneously.

Under Andes I, of course, the date of discovery is the date of accrual. The

only other case directly dealing with the same issue raised in Andes I, i.e., the lack of knowledge of the identity of multiple tortfeasors in a wiretap setting, is Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984). The Ninth Circuit cites virtually all of the above cases, at 1428, as standing for the principle that the statute of limitations begins to run when a plaintiff knows, or should know, "the basis of the cause of action." The court then applied that principle to a fact situation in which the plaintiff alleged that she did not know of the involvement on the telephone company until more than two years after her cause of action accrued against the other defendants. Implicitly, the court held that if she could prove that assertion, id., her claim would not be barred:

> Whether Pavlak should have through reasonable diligence recognized her cause of action against

> Mountain States earlier is a question of fact, and whether Mountain States' involvement was concealed by the other defendants is relevant to such an inquiry on remand. [Citations omitted]

There is thus a direct conflict between the Eighth and Ninth Circuits on the issue of whether, in a wiretap case, the cause of action accrues against all joint tortfeasors simultaneously as of the discovery of the wiretap, or whether the cause accrues sequentially against individual defendants depending upon the time at which the plaintiff knew or could have known of the involvement of the particular defendant in the wiretap activities.

Accrual of causes of action under federal statutes are clearly a recurring theme in litigation in the federal judicial system. It would therefore be appropriate to resolve the direct conflict

between the Eighth and Ninth Circuits, and the indirect conflicts between the Ninth and the Fourth, Eighth, Tenth and District of Columbia Circuits.

United States v. Kubrick: Conflicts and Confusion

It is suggested that because of the peculiar and secretive nature of electronic surveillance, in which all a tortfeasor has to do is to remain silent to be reasonably assured of being immune to suit (because his identity can't be learned and he therefore cannot be served with a complaint), the proper standard for determining when accrual takes place is that enunciated in United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed.2d 259 (1979): a plaintiff must know not only what was done to him, but who did it. Id., 444 U.S. at 122, 100 S. Ct. at 359.

This raises two questions: does Kubrick apply to cases other than medical

malpractice arising under the Federal Tort Claims Act, and if so, is the "who" language part of the holding, and therefore binding, or merely dicta?

The first is comparatively easy to answer. The weight of authority in the lower courts is that Kubrick can be applied to determine the time of accrual in other types of litigation.

In Dubose v. Kansas City Southern Railway Company, 729 F.2d 1026 (5th Cir. 1984), the court held at 1030:

> The Kubrick rule, we think, represents the Court's latest definition of the discovery rule and should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause.

Earlier, the Fifth Circuit also held:

> ...the Supreme Court has rejected the standard which would allow the

> statute of limitations to commence running before the plaintiff was or should have been aware of the causal connection between his injury and the acts of defendants. Until the plaintiff is in possession of the "critical facts that he has been hurt and who has inflicted the injury," [citing Kubrick], the statute of limitations does not commence to run.

Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980).

In a particularly well-reasoned opinion, the trial court in Liuzzo v. United States, 485 F. Supp. 1274 (E.D. Mich. 1980) applied Kubrick to a civil rights case involving the murder of Mrs. Liuzzo during the 1965 civil rights march in Selma, Alabama. Mrs. Liuzzo's children believed that with the successful prosecution of three members of the Ku Klux Klan for civil rights violations,

that the murderers had been punished. It was not until ten years later that the publication of a Senate report revealed that a government informant who had been the chief witness against the three had been lying, and that both he and FBI agents were involved in the death. Applying the what/who analysis, the claims against the new defendants was not barred.

Other courts have, without significant discussion, applied Kubrick to non-medical malpractice cases: Barrett v. United States, 689 F.2d 324 (2d Cir. 1982) (wrongful death); Blanton v. Anzalone, 760 F.2d 989 (9th Cir. 1985) (ERISA); Norris v. Wirtz, 818 F.2d 1329 (7th Cir. 1987) (securities); Mullinax v. McElhenney, 817 F.2d 711 (11th Cir. 1987) (civil rights); Knapp v. United States, 636 F.2d 279 (10th Cir. 1980) (Quiet Title Act).

The second and more important

question is whether this Court intended the issue of the identity of the tortfeasor to be an integral part of the equation used to calculate an accrual date. Some of the lower courts have expressly held that it is, or applied Kubrick in that fashion, while others have directly or indirectly rejected that approach.

The Third Circuit expressly rejected the "who" concept, and held that accrual occurs when a plaintiff simply knows "what", i.e., the fact of injury and the physical cause of injury. Zeleznik v. United States, 770 F.2d 20, 23 (3d Cir. 1985). The Ninth Circuit rejected the "who" concept in Gibson v. United States, 781 F.2d 1334, 1344 (9th Cir. 1985). The case involved FBI agents who allegedly participated in an arson plot against the plaintiffs. The court held:

> Language in Kubrick, emphasizing the strategic importance to the litigant of knowing whom to sue,

supports plaintiffs' proposed construction. See 444 U.S. at 122, 100 S. Ct. at 359 ("the prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury"). However, binding circuit precedent forecloses us from considering such an extension of Kubrick.

The binding precedents were essentially two decisions holding that the "cause is known when the immediate physical cause of injury is discovered." Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984) and Davis v. United States, 642 F.2d 328, 331 (9th Cir. 1981). See also, Outman v. United States, 890 F.2d 1050, 1052 (9th Cir. 1989).

The Sixth Circuit has held that the "who" language was purely dicta, and that Kubrick is tied solely to issues of fraudulent concealment. Dominnie v.

United States, 728 F.2d 301, 304 (6th Cir. 1984).

The Eighth Circuit, while not expressly addressing the issue in Andes I, can be seen to be a "what" circuit nevertheless, since it holds that the cause accrued when the wiretap was discovered, and that Petitioner should have filed suit against her former husband and used the discovery procedures to learn the identity of the additional defendants.

The First, Second, Fourth, Fifth, Seventh, and Eleventh Circuit Courts of Appeals have all applied the what/who analysis in Kubrick.

In Marrapese v. Rhode Island, 749 F.2d 934 (1st Cir. 1984), the plaintiff was unlawfully arrested in 1975 and tested for connection with a crime by application of benzidine to a substantial part of his body. His attorney was present, and even threatened a civil rights suit at the time of the testing. In 1980

a newspaper article discussed a link between cancer and benzidine. Plaintiff filed suit in 1980, but his own evidence showed that benzidine was known in 1975 to be carcinogenic. At 934, the First Circuit applied the what/who analysis and found that plaintiff's civil rights suit was barred because he knew in 1975 both what had been done to him (various civil rights violation regarding the arrest, in addition to the test) and who did it (the police).

In Barrett, supra, at 328, the Second Circuit applied Kubrick to a wrongful death case in which the decedent's death in 1950 was the result of being injected by Army doctors with a chemical derivative of mescaline, i.e., he was an unknowing volunteer/"guinea pig" in a chemical warfare program. The plaintiff daughter had no knowledge of the Army's involvement in her father's death until the government released reports in 1975.

In Gould v. United States Department of Health & Human Services, 884 F.2d 785 (4th Cir. 1989), the Fourth Circuit applied Kubrick to determine that Mrs. Gould's action for the death of her husband accrued against the doctors when she learned that they were federal employees (even though all the events took place in a private hospital).

In Lavellee v. Listi, supra, the case was essentially medical malpractice, and in the process of applying Kubrick, the Fifth Circuit commented at 1131, note 5:

> It might be argued...that the standard for accrual of a cause of action, although federal law under each act, varies from act to act: No such argument has been made here, and prior cases under one federal act have relied on cases under other federal acts concerning accrual of causes of actions. [Citations

omitted] We therefore must assume that the federal standard for accrual of claims does not vary among these statutes, and we are fully justified in relying on cases under those other acts. Kubrick is especially relevant because the claim there, like the primary one here, essentially alleges medical malpractice.

See also, Dubose, supra.

In Nemmers v. United States, 870 F.2d 426 (7th Cir. 1989), a child had been born in 1973 with mental retardation and cerebral palsy (Eric). His parents received a report from a physician in 1977 about possible causes. In 1981 they saw a newspaper article which revealed that improper care before and during birth had resulted in similar injuries to another child. Their suit was filed within two years of this knowledge (the relevant statute of limitations being two

years). Under Kubrick, the District Court applied an objective test to determine whether, on the basis of the 1977 report, a reasonable person in the parents' position would have known enough to identify negligent treatment before and during delivery as a potential cause for the boy's condition. The conclusion was that the 1977 report "would not cause a reasonable person to conclude, or even suspect, that Eric may have been injured as a result of the conduct of the Defendant's medical personnel...." Id. at 428.

In Mullinax v. McElhenney, supra, the Eleventh Circuit relied on Lavellee, supra, and Kubrick, to hold at 716:

> Section 1983 actions do not accrue until the plaintiff knows or has reason to know that he has been injured. [Citations omitted] Nor will a Section 1983 action accrue until the plaintiff is aware or

should have been aware who has inflicted the injury. [Citations omitted]

The District of Columbia Circuit, while not citing Kubrick, nevertheless has used a similar analysis to hold:

> ...plaintiff's knowledge of the grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury. We by no means imply that a plaintiff may postpone suit until he knows every defendant by name and title. However, simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant.

Hobson v. Wilson, 737 F.2d 1, 35-36 (D.C. Cir. 1984), citing Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981) and Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977).

Application of Kubrick to this case

In order to initiate litigation, a plaintiff must be able to plead four things: (1) an act or failure to act; (2) damage resulting from that act or failure to act (whether presumed in law or express); (3) that one or more specific defendants performed or failed to perform the act, and (4) a theory on which to base recovery against the defendant(s).

In a hit and run case, the plaintiff knows the act (an automobile striking a parked car late at night on a well-lit street); the damages ($2,000 to repair the left side of the car) and the theory of recovery (negligent driving). The plaintiff, however, is missing a critical element: who caused the injury. And simply by keeping silent, the defendant may never be known, and never be held accountable for his actions.

In the Kubrick medical malpractice

context, this Court specifically rejected an accrual calculation based on when a prospective plaintiff had knowledge of a theory of recovery, confining it instead to knowing what was done (a combination of the act and the damages) and who did it.

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has

inflicted the injury. He is no longer at the mercy of the latter. Kubrick, supra, 444 U.S. at 122, 100 S. Ct. at 359.

Electronic surveillance is by its very nature surreptitious; it is an even more secretive tort than medical malpractice. A wiretap device placed on a telephone may never be discovered before its removal, or it may be discovered by accident after months of operation, as in this case. Discovery of the wiretap is the "manifestation of the injury" and the damages arise out of the minimum civil penalties established by Congress for violations of the wiretap statute, plus allowing the recovery of punitive damages. In a wiretap case, the "facts about causation" are even more strongly under the control of the putative defendant. Whereas medical records might reveal causation in a medical malpractice case and link the action to a particular physi-

cian, in a wiretap case there are no records a plaintiff can turn to. There is no convenient "dog tag" attached to the device; it is simply there, anonymously. It is only when someone with knowledge of who placed the device, or who caused it to be placed, breaks silence, that a plaintiff can hope to learn the identities of potential defendants.

The District Court and the Eighth Circuit have held that Petitioner in essence had knowledge of both "what" and "who" (her former husband, at least) soon after she discovered the device. And therefore, she should have filed suit against him and used discovery procedures to learn the identities of the other tortfeasors. This analysis is incorrect on two counts.

First, as Petitioner testified, she simply "assumed" her husband had placed the device. She knew information was in the hands of her husband's attorneys but

she had no reasonable basis for determining that he had been responsible for placing the device.

> In assessing the awareness required to trigger the statute of limitations, it is essential to distinguish between "knowledge" and "belief." For one to have knowledge of fact "x," three requisites must be exist: (1) "x" must be true, (2) the person must believe "x" to be true, and 93) the belief must be reasonably based. [Citations omitted] "Belief," which is a component of knowledge, requires only requisites (1) and (2)--"x" must be true and the person must believe it to be true. As a consequence, conclusions based on dreams, intuitions, suspicions, conjecture, ESP, speculation, or faulty reasoning, even if true, are merely "belief." Absent a reasonable basis, these

conclusions do not arise to the level of "knowledge."

Harrison v. United States, 708 F.2d 1023, 1027 (5th Cir. 1983).

It is suggested that an assumption falls somewhere between intuition and ESP in the knowledge spectrum, and she did not therefore know the "who" with sufficient certainty to trigger running of the statute of limitations.

The second fault in the reasoning of the courts below is the assertion, unsupported by fact or law, that Petitioner could have learned of the identity of Respondent through pre-trial discovery by suing Mr. Frick. Yet given Mr. Frick's willingness to perjure himself on the involvement of Mr. Knox and to take the Fifth Amendment with regard to his own involvement how can it be said as a matter of law that she could have learned of the identity of Mr. Knox (sued in Andes I) or the other tortfeasors (sued in

Andes II) from this source? It was not until Mr. Albin's guilty plea broke the silence surrounding the placing of the device that Petitioner had any opportunity to learn who in fact had been responsible for the wiretap.

Question 2 Summary

Although the weight of authority in the Circuit Courts of Appeals is that Kubrick is of general applicability outside the context of medical malpractice claims, there is a sharp split among the Circuits as to the proper interpretation of the what/who analysis in a variety of cases arising under federal law. The cases cited herein are simply the tip of an iceberg of a growing body of law dealing with the proper method of determining accrual dates under a wide range of statutes. Under Supreme Court Rule 10.1(a), the decision in Andes I is in direct conflict with the Ninth Circuit decision in Pavlak, supra. The issue of whether a

cause of action under the wiretap statutes against multiple defendants accrues for all of them simultaneously, or in certain circumstances, sequentially as their involvement is learned, is a recurring one. This is especially so, as Andes II, given the decision of the Eighth Circuit in this matter (Andes I), will almost certainly give rise to another Petition for a Writ of Certiorari since the facts are somewhat different, and the suit was filed more than two years after the effective date of 18 U.S.C. 2520(e), but less than two years after Mr. Albin's guilty plea on December 26, 1987, opened the door to learning the identities of those responsible for the electronic surveillance of Petitioner's home. For these reasons, the Writ of Certiorari should be granted.

CONCLUSION

A direct conflict exists between a decision of the Eighth Circuit (Andes I) and a decision of this Court (Sohn, supra). A direct conflict exists between Andes I and a decision of another Circuit on the same subject matter (Pavlak, supra). The question of the applicability of this Court's decision in Kubrick, supra, to non-medical malpractice cases arising under federal law is an important one that should be resolved by this Court but has not yet been answered. The question of the proper interpretation of the Kubrick "critical facts" analysis of what was done and who did it has sharply divided the Circuits, and as the question of when a federal cause of action accrues is constantly recurring, it is one that should be resolved by this Court so that there is uniformity within the federal judicial system on this subject.

For all the above reasons, Petitioner prays that the Court grant her Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2057

JOSEPHINE A. ANDES,	*	
	*	
Appellant,	*	Appeal from
	*	the United
	*	States Dis-
vs.	*	trict Court
	*	for the West-
	*	ern District
THEODORE R. KNOX,	*	of Missouri
	*	
Appellee.	*	

Submitted: March 16, 1990

Filed: May 31, 1990

Before FAGG and WOLLMAN, Circuit Judges, and DUMBAULD,* Senior District Judge

WOLLMAN, Circuit Judge.

Josephine A. Andes appeals the district court's[1] grant of summary judgment in favor of Theodore R. Knox in her action for damages for illegal wiretapping. We affirm.

I.

In 1984, Andes and her former husband, John W. Frick, were in the

process of dissolving their marriage. During this time, Knox and Leslie E. Albin, apparently private investigators hired by Frick, installed electronic wiretapping devices on the telephone lines leading to and inside Andes' residence with which to record Andes' private telephone conversations. Andes discovered the wiretapping in December 1984. In December 1987, Albin pleaded guilty to wiretapping. Until the time of Albin's guilty plea, Andes believed that it was Frick who had wiretapped her residence.

On November 22, 1988, Andes brought suit against Albin and Knox pursuant to 18 U.S.C. Sec. 2520, which provides a civil cause of action against those who intercept oral communications.[2] Knox filed a motion for judgment on the pleadings. Treating the motion as one for summary judgment, the district court granted summary judgment in favor of Knox, finding that the statute of

limitations in 18 U.S.C. Sec. 2520(e) had run, barring Andes' cause of action. Andes appeals.

II.

Section 2520(e), enacted in 1986, provides that "[a] civil action under [section 2520] may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation." Prior to 1986, section 2520 had no limitations provision.

We do not agree with Andes' contention that the limitations period should run from the date of Albin's plea agreement in 1987. Under section 2520(e) the cause of action accrues when the claimant has a reasonable opportunity to discover the violation, not when she discovers the true identity of the violator or all of the violators. We agree with the district court that there is no material issue of fact concerning when Andes

discovered the violation: the limitation period began to run in 1984 when Andes discovered the wiretapping. Andes was aware of a cause of action against Frick at that time. She could have sued Frick under section 2520 and sought the identity of other defendants through discovery. Therefore, we find that the limitations period had run by the time Andes filed her complaint in 1988.

Andes also contends that because section 2520 was first enacted in 1986, the district court should not have applied its limitations period retroactively to the wiretapping violation she discovered in 1984. Because Andes did not raise this argument in the district court, however, we will not consider it on appeal. See Kapp v. Naturelle, Inc., 611 F.2d 703, 709 (8th Cir. 1979).

The judgment is affirmed for the reasons set forth in the district court's opinion.

FOOTNOTES

* The HONORABLE EDWARD DUMBAULD, United States Senior District Judge for the Western District of Pennsylvania, sitting by designation.

1. The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

2. Andes dismissed the action as against Albin, having never served process upon him.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 88-1152-CV-W-6
	)	
LESLIE E. ALBIN and THEODORE R. KNOX,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this suit pursuant to 18 U.S.C. Sec. 2520, which provides for the recovery of civil damages by victims of illegal wiretapping activities. In her Complaint, plaintiff alleges that between April and December 1984, defendants intercepted, disclosed or intentionally used the home telephone conversations of plaintiff Josephine Andes without her knowledge or consent. Complaint, Paragraphs 2 & 3. She further alleges that prior to December 29, 1987, the date on which defendant Leslie E.

Albin pleaded guilty to a criminal violation of 18 U.S.C. Sec. 2511(1)(a), plaintiff had no reasonable opportunity to discover either the violation or the fact that her rights under 18 U.S.C. Sec. 2511(1)(a) had been violated. Complaint, Paragraph 4. This cause presently pends before the court on the motion of defendant Theodore R. Knox for judgment on the pleadings.

BACKGROUND FACTS

During the time period beginning sometime in April 1984, and continuing through December, 1984, plaintiff Josephine A. Andes was involved in a divorce proceeding with former husband John W. Frick. At the time, plaintiff resided at 1724 North 11th Street, Blue Springs, Missouri. On or about December 7, 1984, plaintiff discovered electronic wiretapping devices upon the telephone lines leading to and inside her residence. Plaintiff's Suggestions in Opposition to

Defendant's Motion for Judgment on the Pleadings (Doc. No. 14), at 1. At the time of discovery, however, plaintiff alleges that she believed her former husband, John W. Frick, to be the only person responsible for the electronic wiretapping devices installed on her telephone lines. Doc. No. 14, at 2.

On December 26, 1987, defendant Leslie E. Albin entered a plea of guilty in the case styled United States of America v. Leslie E. Albin, Case No. 87-00283-01-CR-W-6. On that date, plaintiff alleges that she became aware for the first time of the identity of her former husband's "representatives." Id. Plaintiff claims that she had no reasonable opportunity to discover the identities of Albin and Knox prior to the entry of Albin's guilty plea.

JUDGMENT ON THE PLEADINGS

Defendant Knox has moved the court for judgment on the pleadings. In

support of his motion, Knox asserts that the limitations provision contained in 18 U.S.C. Sec. 2520(e) bars plaintiff's recovery in this action. Section 2520(e) provides that:

> A civil action brought under this section may not be commenced later than 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. Sec. 2520(e). Since plaintiff commenced her civil action on November 22, 1988, nearly four years following the date on which she admittedly discovered the illegal wiretap in her Blue Springs home, defendant Knox seeks dismissal of the instant cause of action pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.[1] Because both parties have submitted matters outside the pleadings for the court's consideration, defendant's motion will be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts must be viewed in the light most favorable to the nonmoving party who must be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Raschick v. Prudent Supply, Inc., 803 F.2d 1497, 1499 (8th Cir. 1987), cert. denied, 108 S. Ct. 1111 (1988).

If a party is unable to make a sufficient showing as to some essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immateri-

al. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A part seeking summary judgment bears the initial burden of demonstrating to the court that an essential element of the nonmoving party's case is lacking. Id. The burden then shifts to the nonmoving party either to come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element, or to explain why such evidence is not currently available. Id., Fed R. Civ. P. 56(f). The standard for determining whether a factual dispute is genuine is the same as the standard applied to motions for directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The nonmoving party must come forward with sufficient evidence to allow a reasonable jury to find in its favor. Id. at 251.

DISCUSSION

In support of his motion, defendant Knox submits copies of pleadings filed in

1984 in the Circuit Court of Jackson County, Missouri, where plaintiff's divorce action against former husband John William Frick was then pending. These pleadings clearly indicate that at the time of the divorce proceeding, plaintiff was already aware of the illegal wiretap which had been placed within her Blue Springs home. As noted above, however, plaintiff admits that she discovered the illegal wiretap on or about December 7, 1984.

Plaintiff contends that prior to the December 26, 1987, guilty plea entered by Leslie E. Albin in Case No. 87-00283-01-CR-W-6, she had no knowledge of defendants' participation in the illegal wiretap. Prior to the guilty plea, she allegedly knew only that her ex-husband, John W. Frick, or his representatives, had illegally installed an electronic wiretapping device on her telephone line. She argues that the

question of when she had actual knowledge of defendants Leslie E. Albin and Theodore R. Knox' participation in the installation of the electronic wiretapping device is a question of fact which should not be resolved by the court as a question of law. In support of her position, plaintiff submits deposition testimony of John W. Frick taken during the 1984 divorce proceedings in which Frick identifies Ted Knox as a private investigator hired only to follow plaintiff and to take photographs. See Exhibit C to Doc. No. 14. Additionally, plaintiff supplies her own deposition testimony given August 30, 1985, in which she states that she had knowledge of the illegal wiretap, but assumed that her exhusband, John Frick, was the person who had tapped her telephone. See, Exhibits F, H & I to Doc. No. 14.

Section 2520 was amended in 1986 to require that a lawsuit to recover civil

damages for illegal wiretap be brought no later than two years after the date upon which plaintiff first has a reasonable opportunity to discover the violation. 18 U.S.C. Sec. 2520(4). Prior to the amendment, numerous courts had held that a cause of action under Sec. 2520 accrues when plaintiff discovers, or with reasonable diligence should have discovered, the illegal wiretap. See, e.g., Pavlak v. Church, 727 F.2d 1425, 1426 (9th Cir. 1984); Brown v. American Broadcasting Co., Inc., 704 F.2d 1296, 1304 (4th Cir. 1983); Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979), cert. denied, 453 U.S. 912, reh'g. denied, 453 U.S. 928 (1981); Awbrey v. Great Atlantic and Pacific Tea Co., 505 F. Supp. 604, 609 (N.D. Ga. 1980). Defendant Knox contends that had plaintiff filed her Complaint in this cause within two years following her discovery of the illegal wiretap she, through exercise of reasonable diligence

during discovery, could have learned of defendants Knox and Albin's alleged participation in the installation of electronic surveillance equipment.

In Newcomb v. Ingle, the Tenth Circuit affirmed the district court's ruling that the filing of a motion to suppress intercepted recordings established the plaintiff's actual knowledge of a violation and, therefore, barred his Sec. 2520 claim. 827 F.2d 675, 679 (10th Cir. 1987). Newcomb had contended that Ingle had fraudulent concealed a conspiracy to use the tapes illegally in a criminal proceeding against plaintiff and that, therefore, the statute of limitations should be tolled. The court rejected plaintiff's argument, concluding that as set out in plaintiff's own pleadings, "there is no potential for a cognizable issue of fact on a theory of fraudulent concealment." Id. Here, as in Newcomb, there is no potential for a cognizable

issue of fact as to when plaintiff discovered a violation of Sec. 2520. Her suit is, therefore, barred by the applicable statute of limitations. Accordingly, defendant Knox' Motion will be GRANTED. SO ORDERED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: June 2, 1989.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2057WM

JOSEPHINE A. ANDES,	*	
	*	
Appellant,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion for
THEODORE R. KNOX,	*	hearing En
	*	Banc
Appellee.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 11, 1990

Ordered entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. CV-1119-CV-W-6
	*	
JOHN W. FRICK, et al.,	*	
	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

Plaintiff's complaint alleges that, between April and December 1984, defendants intercepted and disclosed her home telephone conversations without her consent, in violation of 18 U.S.C. Sec. 2520. Defendants have moved to dismiss, arguing that plaintiff's cause of action is barred by the two year statute of limitations found in Sec. 2520. 18 U.S.C. Sec. 2520(e).[1] The two year limitations period was added to the statute in a 1986 amendment which had an effective date of January 19, 1987. Public Law 99-508,

Sec. 111. The pending motions to dismiss contend that the limitations period for this action began on January 19, 1987, and that this action, filed in November 1989, is therefore barred.

In Reynolds v. Heartland Transportation, 849 F.2d 1074 (8th Cir. 1988), plaintiff, a seaman, brought suit under maritime law for personal injury. After he was injured, Congress enacted 46 U.S.C. Sec. 763a to provide a three year statute of limitations for such claims. Plaintiff filed suit more than three years after the limitations period was adopted. In dismissing his claim, the court wrote:

> It is obvious from the dates that appellant's injuries (on March 24, 1980) occurred before the enactment of Section 763a (on October 6, 1980). But it is also obvious that by the time appellant sued (on February 4, 1987), he had permitted the entire three year period specified in Section 763a to pass. Clearly he had a reasonable opportunity to sue (after the enactment of this statute

> of limitations) before the three year statute could have operated to cut off his action.
>
> We believe that such a reasonable opportunity to sue before the statute could have foreclosed his suit suffices to prevent application of the statute to his case from being retroactive and unconstitutional.

Id. at 1075. The two year statute of limitations in Sec. 2520 commenced with the effective date of the amendment and, if applicable, bars plaintiff's lawsuit. The quoted language demonstrates that there is no constitutional problem with applying Sec. 2250(e) [sic] to this lawsuit, and that the Eighth Circuit has approved application of a subsequently enacted limitations period in similar circumstances.

While the Reynolds rationale appears to foreclose plaintiff's claim, several points should be addressed. In Scutieri v. Estate of Revitz, 683 F. Supp. 795 (S.D. Fla. 1988), the court refused to

apply Sec. 2520(e) to bar a claim which had accrued in 1980 and was timely filed, under Florida law, in 1984, holding that Congress did not intend the new limitations period to apply retroactively. The present matter, however, does not involve retroactive application. Section 2250(e) [sic] is merely being applied to a pre-existing cause of action and this is permissible. Sohn v. Waterson, 84 U.S. 596 (1873).

Plaintiff also contends that, because there was no specific limitations period in effect when the telephone conversations were intercepted, the most closely analogous state law applies. Newcomb v. Ingle, 827 F.2d 675 (10th Cir. 1987). If the Missouri five year period governs, Sec. 516.120, R.S.Mo., this action is arguably timely. Plaintiff cites Kotval v. Gridley, 698 F.2d 344 (8th Cir. 1983), in which the court, construing South Dakota law, applied the six year

statute of limitations which prevailed at the time plaintiff's cause of action accrued rather than the three year period subsequently adopted by the South Dakota state legislature. The issue in Kotval involved a change in the limitations period under South Dakota law for a cause of action based on South Dakota law. Kotval provides no guidance where a subsequently enacted and specific federal limitations period conflicts with state law in an action grounded exclusively in federal statute. There is no assertion that Congress intended that state limitations periods apply as long as possible, so there is no reason to consider Missouri law. Even if Missouri law provided the limitations period in 1984, "[a] litigant has no vested right to maintenance of the status quo existing at the time of his injury with respect to the time within which a legal remedy remains available." Reynolds, 849 F.2d at 1075.

Accordingly, it is hereby

ORDERED that the motions to dismiss filed by defendants Paden, Welch, Martin and Albano, P.C., John W. Frick, Rose Anne Nespica, Robert L. Trout, and Trout and Nespica are GRANTED and this matter is DISMISSED in its entirety.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: March 28, 1990.

FOOTNOTES

1. While the cause of action does not accrue until a plaintiff "first has a reasonable opportunity to discover the violation," the date of discovery is not an issue presented by plaintiff, as it was in Andes v. Albin, et al., No. 88-1152-CV-W-6.

EXCERPT FROM THE DEPOSITION OF JOHN WILLIAM FRICK (taken June 20, 1985)

(Pages 48 - 50 in the Legal File in the United States Court of Appeals for the Eighth Circuit)

NOTE: This deposition was taken in the matter of Andes v. Andes, No. DR 84-1285, in the Circuit Court of Jackson County, Missouri. The questions which follow were propounded by Charlotte Thayer, attorney for Josephine Andes. Mr. Frick was represented at the deposition by attorneys Rose Anne Nespica and Michael Albano.

A She has been seen dating Bob McDaniels.

Q What do you mean she's been seen dating him? Explain that to me.

A Someone followed her. They went to a restaurant and went to a movie.

Q Who followed her?

A Ted Knox.

Q Who is Ted Knox?

A He's a private investigator.

Q Someone you employed to follow her?

A Yes.

Q When did you first employee [sic]

him to follow Jo Ann?

A Right after we separated.

Q And how recently has he followed her?

A That was basically it. I found out, you know, what I wanted to know as far as whether or not I could make the relationship--whether she was being honest with me. And I basically knew before that. But I guess you just want to know for sure.

Q How much money have you paid Ted Knox?

A I don't remember. It was probably about--I don't remember. $300 or $400.

Q Did you employ Ted Knox to do anything other than follow Jo Ann?

A No. Oh, he took some pictures.

Q When did he take pictures?

A The day he followed her.

Q The day? He followed her only one day?

A I really don't know how often he followed her. But I know, you know, he told me about Bob McDaniels, and he took pictures on that day.

Q Pictures of Jo Ann going out to dinner and going to a show?

A Yes. And it was like a week after we were separated or very shortly thereafter.

Q And you think that's evidence she was having an affair with Bob McDaniels?

A Well, as I said when you said had she had relationships, I said, "I don't know how far you want to go."

Q Do you consider that she was having an affair with Bob McDaniels?

A No. I'd say that was a date.

Q All right. Did Ted Knox take pictures of Jo Ann with anyone else?

A No. Not that I know of.

Q Did he follow her when she was involved in any activities with anyone

else?

A Not to my knowledge.

Q Did a person named DeMoe, under either the direction of Ted Knox or directly for you, follow or otherwise attempt to obtain information on Jo Ann's activities?

A He didn't do anything under my direction, nobody by that name.

Q You know who this man is; do you not?

A I know who DeMoe is.

Q Does Ted Knox have an occupation, other than as a detective, private detective?

A I don't know.

Q You don't know whether he is employed by a police department?

A No.

MS. THAYER: I'd like to take a break for a few minutes.

(A recess was taken.)

Q (By Ms. Thayer) Mr. Frick, did you

ever cause any wiretapping devices to be established in the home at 1724 North 11th Street Court?

A I wish to invoke the Fifth Amendment privilege against self-incrimination, and I decline to answer that question on the grounds that it might tend to incriminate me.